No. 49839-1

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

In re the Marriage of

JOHN MASON,

Appellant,

and

TATYANA MASON,

Respondent.

REPLY BRIEF OF APPELLANT

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REPLY RE STATEMENT OF THE CASE

As she has throughout this litigation, Tatyana continues her intransigent insistence on making unsupported, argumentative, irrelevant, and outrageously false allegations and innuendos. *See, e.g.*, BR 3 ("John's misstatement of many facts"); BR 4 ("John lost his incentive to support permanent residence"); ("By 2001, John had begun committing domestic violence against Tatyana"); ("John had taken her passport"); BR 5 ("John kept the children as hostage"); ("John kidnapped the children"). Most of these falsehoods have no citation at all, and those that apparently do are unsupported by the record. This goes on throughout her brief.

The Court should disregard her irrelevant and unsupported allegations. Such allegations – none of which has anything to do with the legal issues at stake – are scurrilous attempts to prejudice this Court. While that is not possible, her continued intransigence confirms the need for a fee award to John. BA 48-49.

Tatyana's Statement of the Case is also argumentative, violating RAP 10.3(a)(5) ("A fair statement of the facts . . . without argument"). Even when she cites to something relevant to what she is saying, she often misrepresents the record: for example, she claims that, "On the witness stand, John Mason refused to answer

directly whether he had ever signed an I-864." BR 11 (citing RP 397-98, 403). To the contrary (RP 397):

> BY MS. MASON: Q. So, basically, I forgot where we are. Okay. Yeah. Previously, we've been talking about what you agreed it was just signature, right, on affidavit I-864, and you agree with you signed under oath, right?
>
> A. Yes.

While her question was anything but direct, his answer was direct.

Her Statement of the Case also is not "fair" – it is one-sided, argumentative, unsupported, and incorrect much of the time. She fails even to acknowledge this Court's prior decision, which is the law of the case. *See* BA 4-10. And she fails to recognize that most of what she discusses is simply irrelevant to the child support issue. Again, this court should disregard her improper irrelevancies.

To the extent Tatyana hazards the occasionally accuracy, her allegations simply comport with John's statements and the record. Despite her hyperbole, Tatyana cannot identify a single false or misleading statement in John's Statement of the Case. She also has trouble recognizing candor.

REPLY ARGUMENT

A. The trial court erred as a matter of law and abused its discretion in *sua sponte* converting Tatyana's fourth motion into a CR 60(b)(11) motion, and in ruling in her favor under that subdivision.

John explained that even though the trial court denied Tatyana's final motion to reconsider the order denying her motion to revise the Commissioner's ruling denying reconsideration of its order denying her motion to vacate the unappealed Child Support Order that she agreed to in 2013, it *sua sponte* decided to hear *the same motion* as a CR 60(b)(11) motion. BA 29-36. The court erred as a matter of law and abused its discretion in using this rule, where no extraordinary circumstances justify setting aside the 2013 Child Support Order, and no findings support it. *Id.* This Court should reverse and dismiss.

With broad overstatement, Tatyana cites and quotes – but fails to discuss – ***Shandola v. Henry***, 198 Wn. App. 889, 396 P.3d 395 (2017). BR 38. ***Shandola*** holds that "CR 60(b)(11) provides a mechanism for vacating a final judgment *based on a postjudgment appellate court decision invalidating the statutory basis of the judgment*." 198 Wn. App. at 896 (emphasis added). Tatyana cites no postjudgment decision invalidating the child support statutes. On the contrary, ***Kahn*** contradicts her position. *See* BA 34 (citing

Marriage of Kahn, 182 Wn. App. 795, 801, 332 P.3d 1016 (2014)). ***Shandola*** does not help Tatyana.

Tatyana again descends into wholly unsupported, irrelevant, and scurrilous allegations to distract the Court from the issue at hand. BR 39-41. Virtually none of this is supported by citations, much less the record. The trial court entered no findings regarding her irrelevant falsehoods. This Court should disregard them.

That is the extent of Tatyana's response to the central issue in this appeal. She does not deny that CR 60(b)(11) is limited to extraordinary circumstances involving irregularities extraneous to the action, or going to the regularity of the proceedings. BA 30-31 (citing ***Marriage of Flanagan***, 42 Wn. App. 214, 709 P.2d 1247 (1985); ***State v. Keller***, 32 Wn. App. 135, 647 P.2d 35 (1982)). No such circumstances exist here, and no findings were made.

1. CR 60(b)(11) is not a means to correct Tatyana's lawyer's failure to present the I-864 form in 2013.

Tatyana does not deny that legal errors – such as her trial lawyer's failure to submit evidence she claims was relevant – "are not correctable through CR 60(b)." BA 31 (quoting ***Keller***, 32 Wn. App. at 140 (quoting ***Hurley v. Wilson***, 129 Wash. 567, 568, 225

P. 441 (1924))). She does not deny that her trial lawyer may well have withheld the I-864 as a trial tactic. BA 32 (citing CP 1258).

Tatyana neither denies nor addresses the many cases stating that attorney negligence is not correctable under CR 60. BA 32-33 (citing ***Lane v. Brown & Haley***, 81 Wn. App. 102, 104, 912 P.2d 1040 (1996); ***Haller v. Wallis***, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978); ***Winstone v. Winstone***, 40 Wash. 272, 274, 82 P. 268 (1905); ***In re Burkey***, 36 Wn. App. 487, 490, 675 P.2d 619 (1984)). She does not address – much less invoke – the exception for when an attorney acts without authorization. *See* BA 32 (citing ***Graves v. P.J. Taggares Co.***, 25 Wn. App. 118, 125, 605 P.2d 348, *aff'd in part, rev'd in part*, 94 Wn.2d 298, 616 P.2d 1223 (1980)). She does not address or distinguish ***Lane*** or ***Haller***. BA 32-33. Those cases are dispositive. This Court should reverse.

2. No findings of extraordinary circumstances.

Tatyana does not deny that the trial court failed to enter any findings of extraordinary circumstances. BA 33-34. Failing to raise (frankly immaterial) evidence at trial is not extraordinary. *Id*. Again, the trial court erred as a matter of law and abused its discretion. This Court should reverse.

3. Failing to submit evidence is not extraneous to the proceedings.

Tatyana does not argue that her trial lawyer's failure to submit evidence was extraneous to the proceedings. BA 34-35. Nor does she argue that it made the proceedings "irregular." *Id*. Neither applies. This Court should reverse.

4. Tatyana did not move in a "reasonable time."

Tatyana does not argue that she moved within a reasonable time. BA 35-36. A reasonable time is not just any time.

In sum, Tatyana has no relevant response to the controlling law holding that trial courts may not use CR 60(b)(11) to set aside a valid child support order that Tatyana agreed to and did not appeal. The trial court erred as a matter of law and abused its discretion. This Court should reverse on this independently sufficient ground.

B. The trial court erred in denying reconsideration.

For the same reasons, John explained that the trial court abused its discretion in denying reconsideration. BA 38-41. John also explained that the court had overreached in making findings about the binding nature of the I-864 affidavit, an issue the trial court repeatedly ruled was not before it. *Id.* This Court should reverse on both grounds.

Tatyana has little to say on this issue. BR 44. On the CR 60(b)(11) issue, she refers back to her inadequate response to that issue. *Id*. For the reasons stated *supra*, her response remains insufficient to rehabilitate that ruling.

On the I-864 "findings," she fails to respond on the merits, instead claiming that they are irrelevant. *Id*. But such findings could be used against John in other proceedings – which Tatyana has already instigated. The findings go far beyond the trial court's own rulings on what was properly before it. For the reasons stated in the opening brief, this Court should strike them. BA 39-41.

C. The trial court erred as a matter of law in repeatedly considering a motion that had been denied (three times) – final rulings never appealed.

John argued that the trial court erred as a matter of law in repeatedly considering a motion that had been denied three times – final rulings never appealed. BA 25-28 (relying on BA 10-14). Tatyana points out that John did not argue "collateral estoppel," while admitting that he "did complain repeatedly about the number of court proceedings in this case." BR 34; *see, e.g.* CP 1079-80, 1188, 1191, 1371-73. It is true that the legal doctrine was not raised. As a result, John did waive this defense. ***Petcu v. State***, 121 Wn. App. 36, 70, 86 P.3d 1234 (2004) ("failure to plead and

prove collateral estoppel constitutes a waiver of the defense") (citing ***Riblet v. Ideal Cement Co.***, 57 Wn.2d 619, 620, 358 P.2d 975 (1961)).

But John made clear to the trial court that repeatedly raising and losing the same motion over and over should be barred. If this Court does not simply reverse because CR 60(b)(11) does not apply as explained *supra*, then it should exercise its discretion to consider this issue due to the extraordinary intransigence Tatyana has exhibited. RAP 2.5(a) ("The appellate court *may* refuse to review any claim of error which was not raised in the trial court").

Tatyana argues that simply because her lawyer failed to proffer a piece of evidence (the I-864 form) in the first trial, the *child support issue* is not precluded. BR 34-36. But the *issue* here is whether 2013 Child Support Order is somehow invalid due to Tatyana's lawyer's failure to submit this evidence at trial, not whether the first trial judge should have considered evidence her lawyer never proffered – it could not do so. Tatyana cites no precedent for vacating a child support order simply because a piece of evidence could have been, but was not, proffered at trial. She is precluded from relitigating child support over and over.

Tatyana tacitly concedes that the earlier proceeding ended in a judgment on the merits and that she was a party to that proceeding, failing to address those factors. BR 36-37. But she argues that applying collateral estoppel would work an injustice against her. BR 36-37. She claims that John has "unclean hands" because he – just like Tatyana – forgot about the I-864 form from roughly 20 years earlier. BR 36. It is unclear what the condition of his hands has to do with anything, as she cites no legal authority. Simply forgetting is not wrongful.

Tatyana implies that John "had a duty" to disclose the I-864 form he forgot about signing and that this prejudiced her. BR 36-37. But as her own "expert" testified, she had an independent duty to pay the child support, regardless of the I-864. *See* BA 19 (citing RP 89-90). Trial courts need not even consider I-864s, much less enforce them. *See* ***Kahn***, 182 Wn. App. at 801. The I-864 is frankly irrelevant to her duty to pay child support.

This Court should reverse and dismiss.

D. The evidence contradicts finding H.

John explained that Tatyana's own "expert" contradicted the trial court's finding H. BA 36-38. This "finding" is really a conclusion about the legal effect of her "current immigration status." *Id*. And the

crux of this argument is that the unsupported finding is legally irrelevant to the trial court's erroneous CR 60(b)(11) ruling. BA 38.

Tatyana misses these points, instead trying to bolster the "finding" with allegations – but no citations – to alleged testimony supporting it. BR 41-43. Regardless of her unsupported factual allegations, she fails to rehabilitate this conclusion. It does not support – much less salvage – the erroneous CR 60(b)(11) ruling.

E. The trial court erred in granting Tatyana's so-called expert-witness fees, and in "sanctioning" John under CR 11, all without required findings or tenable reasons.

John noted that the trial court erred in granting "attorney fees and costs" in precisely the amount of Tatyana's so-called expert-witness fees, where Tatyana claimed she was *pro se*. BA 41-48. It further erred in "sanctioning" John under CR 11, where it entered no findings supporting sanctions. *Id*. Nor should Tatyana prevail here, so the fees should fall. *Id.* This Court should reverse.

Tatyana begins by misstating Johns' argument and claiming he cited no authority supporting her strawman version. BR 45. Nowhere did John argue that "it is not proper to award expert costs to a *pro se* litigant." *Id*. It is improper to award *attorney fees* to a *pro se* litigant, as the trial court itself noted. BA 42. The alleged absence of any attorney charging those fees – together with the

total absence of findings justifying a fee award – requires reversal of the $8,533 "Attorney's Fees and Costs" awarded. *Id.*; CP 1368.

Citing no authority, Tatyana apparently argues that need vs. ability to pay is a proper basis for awarding attorney fees to a *pro se* litigant. That is simply wrong. And in any event, the complete absence of findings supporting the fee/cost award requires reversal and remand. ***Marriage of Bobbitt***, 135 Wn. App. 8, 29-30, 144 P.3d 306 (2006); BA 43.

The same is true regarding CR 11 sanctions. BA 43-48; ***N. Coast Elec. Co. v. Selig***, 136 Wn. App. 636, 649, 151 P.3d 211 (2007). The trial court simply failed to enter the necessary findings.

Failing to address that dispositive point, Tatyana turns to "intransigence" – a ground never mentioned by the trial court. BR 46. It would undermine our courts' careful limitations on CR 11 sanctions to hold that a ground never raised or argued – and for which no findings were entered – could support a CR 11 sanction. No case permits this sort of end-run.

Tatyana apparently argues that because the trial court disbelieved John, sanctions are warranted due to the "unnecessary" trial. BR 47. This Court long ago rejected this sort of claim in ***Rogerson Hiller Corp. v. Port of Port Angeles***, 96 Wn.

App. 918, 982 P.2d 131 (1999). There, the defendant argued that the plaintiff had engaged in "bad faith" litigation conduct and pursued frivolous claims after an advisory jury rejected the plaintiff's testimony; the trial court therefore awarded attorney fees. Reversing, this Court held that even bringing "a frivolous claim is not enough, there must be evidence of an 'intentionally frivolous [claim] brought for the purpose of harassment.'" ***Rogerson***, 96 Wn. App. at 929 (quoting ***In re Recall of Pearsall-Stipek***, 136 Wn.2d 255, 266-67, 961 P.2d 343 (1998)). Absent an express finding of bad faith, the fee award must be reversed:

> The trial court did not find the testimony credible. But many if not most trials turn upon which party is the most credible. And this decision frequently comes down to deciding that a party is simply not believable on the principal issue. The conduct here does not rise to the level of bad faith required by *Pearsall-Stipek*. We recognize that the trial court did not have the benefit of the *Pearsall-Stipek* decision, but based on that decision we conclude that the trial court abused its discretion in awarding attorney's fees for bad faith.

96 Wn. App. at 930.

Under this reasoning, even if the trial court properly vacated the 2013 Child Support Order under CR 60(b)(11) – which it did not – and even if the absence of findings were not fatal – which it is – simply disbelieving John is insufficient basis for awarding CR 11 (or "bad faith") attorney fees. This Court should reverse.

F. This Court should award John his appellate fees and costs based on Tatyana's intransigence.

Tatyana acknowledges that intransigence can be a proper basis for a fee award. BR 46 (citing ***Marriage of Raskob***, 183 Wn. App. 503, 518, 334 P.3d 30 (2014)). It is a proper basis here for awarding John his fees. BA 48-49. Tatyana has no response.

G. Tatyana is not entitled to attorney fees on any basis.

Tatyana requests attorney's fees based on need (RAP 18.1) and under RAP 18.9. BR 48-49. This is hubris. Throughout this litigation she has repeatedly claimed – not just in briefs, but in numerous other pleadings – that she is *pro se*. Yet on page 48, she now claims that she has a lawyer's assistance on this appeal. While that may be obvious from the sharp contrast in tone between her own statement of the case, and her attorney's legal arguments, that no attorney was willing to sign her brief speaks volumes about its candor.

Tatyana cannot obtain fees because no lawyer is representing her in this appeal. If one is, she should be judicially estopped by all her prior statements that she cannot afford a lawyer and cannot defend this appeal without one.

As for her frivolous appeal argument, it is frivolous. Ignoring the CR 60(b)(11) argument does not make it go away, much less

render it frivolous. It is meritorious. And her "frivolous appeal" argument is more of Tatyana's extraordinary intransigence throughout this case. This Court should award John fees on appeal.

CONCLUSION

This Court should reverse and dismiss due to the trial court's errors of law and abuses of discretion under CR 60(b)(11). If not, it should reverse due to collateral estoppel. Either way, it should grant John fees on appeal.

RESPECTFULLY SUBMITTED this 5th day of February 2018.

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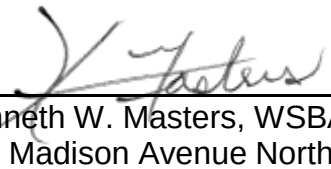

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CERTIFICATE OF SERVICE

I certify that I caused to be filed and served, a copy of the foregoing **REPLY BRIEF OF APPELLANT**, on the 5th day of February 2018, as follows:

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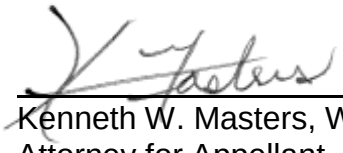

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